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1976 JAN -9 AM 9:45

FROM : Department of State

SUBJECT : GOJ Interpretation of FCN Treaty

REF : Tokyo 11177

Department Legal Adviser's office has examined meaning of paragraph 3 of Article XXII of the U.S.-Japanese FCN Treaty signed at Tokyo April 2, 1953, and fully concurs with Embassy's general position as set forth reftel.

Most persuasive arguments we have found are (a) law review article on FCNs by Herman Walker, Jr., who formulated modern (i.e., post-WW II) form of FCN treaty and negotiated many FCNs; and (b) negotiating record of U.S.-Japan FCN, especially Dispatch No. 13 from Tokyo of April 8, 1952. Both documents are enclosed. Walker cites (pp 380-81), para 3 of Japanese FCN as standard definition of company for purposes of treaty, i.e., in the standard FCN treaty "A 'company' is defined simply and broadly to mean any corporation, partnership, company or other association which has been duly formed under the laws of one of the contracting parties; that is, any 'artificial' person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit." This formulation is intended to avoid such complex questions as the law to be applied in determining company status. Every association meeting test of valid existence must have its "company" status duly recognized and is then eligible for substantive rights granted to companies under the treaty.

In Dispatch 13 (p. 5), Jules Bassin, Legal Attache to Embassy, stated to Mr. Mikizo Nagai, Chief, Sixth

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Section, Economic Affairs Bureau, that "the recognition mentioned in the second sentence of paragraph 3...meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party."

Thus, all that para 3 is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted, the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

For reasons stated above, argument in para 2 of reftel that nationality of a company is determined by nationality of shareholders is not correct. Rather, a company has nationality of place where it is established (see pp. 382-83 of Walker). However, this does not mean that GOJ is free to deny treaty rights to U.S. subsidiary set up in Japan. While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, an American Company (i.e., one organized under U.S. law), may manage its Japanese subsidiary (i.e., a company set up under Japanese law). So too, under Article I, a U.S. national may enter Japan to direct his investment, even though the investment is a Japanese company. In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrue to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.

KISSINGER

Enclosures:

Herman Walker Law Review Article on FCNs
Dispatch No. 13 from Tokyo Apr. 8, 1952

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Office of the United States Political
Adviser for Japan,
Tokyo.

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft
Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEZAKU, Secretary, First Section, Economic Affairs
Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs
Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Mikizo NAGAI, Chief, Sixth Section, Economic Affairs Bureau
For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan.

Date: Tuesday, April 8, 1952.

FOURTEENTH OFFICIAL MEETING

ARTICLE XX

Mr. Otabe stated that in order to avoid any possible differences in interpretation it should be clearly understood that the meaning of the word "transit", as used in Article XX, was the same as that used in Article V, paragraph 1 of the GATT, which states:

"Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this Article 'traffic in transit'."

Mr. Otabe added that it should also be understood that "transit through the territories of each Party", mentioned in Article XX, includes passengers, baggage, and products carried by aircraft.

Mr. Singer replied that the GATT definition of "transit" was acceptable in interpreting Article XX, and that Mr. Otabe's understanding with reference to

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the inclusion of aircraft traffic was correct.

Mr. Otabe stated that under present regulations, export validations are required in Japan for the temporary unloading and trans-shipment of cargoes when these involve specific commodities subject to export licensing under Japan's security export control procedures. He asked for confirmation of his understanding that the implementation of security export controls would not be regarded as constituting "unnecessary delays and restrictions", as mentioned in Article XI.

Mr. Adams replied that Mr. Otabe was correct in his understanding, and that security measures, including export validations and licenses, were permissible under paragraph 1 (d), Article XI.

ARTICLE XXI

Mr. Otabe referred to previous discussions on Article VIII (at the fifth meeting, March 7, 1952) when the Japanese side had proposed that the second sentence of paragraph 3 (i.e. "Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities.") be deleted from that Article in as much as this clause was of general application. Mr. Otabe stated that this provision might more appropriately fit in Article XI, and he now proposed that it be inserted in the latter Article.

Mr. Adams replied that when this clause was included in the provision on general exceptions in other United States FCN Treaties (for example in the Treaties with Colombia, Israel, Uruguay and others), the phraseology employed was: "The present Treaty does not accord any rights to engage in political activities". Subject to the views of the Department of State, which might prefer to use the terminology just mentioned, Mr. Adams suggested that this Article be amended as proposed by Mr. Otabe (i.e., that the second sentence, paragraph 3, Article VIII be inserted in Article XXI as paragraph 3-bis, for subsequent re-numbering in the final draft).

Mr. Otabe stated that the Japanese side earnestly desired that the second sentence of paragraph 3, Article XI, reading, "Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement" (i.e., GATT), be deleted from this Article. Mr. Otabe pointed out that since Japan is not a member of the GATT, such concessions as are granted by the United States under a multilateral agreement not yet open to Japan, would be outside the scope of the Application of most-favored-nation treatment. The purpose of the present treaty prescribing unconditional most-favored-nation treatment would therefore actually be defeated in practice. Furthermore, he said, since the United States is in fact granting the GATT concessions to Japan, the deletion of this sentence would have no effect on the actual relations between the two countries. He again pointed out that the present FCN Treaty will become a model for future treaties to be negotiated between Japan and other countries, and that it was feared that the inclusion of this sentence would establish an unfavorable and most unfortunate precedent, particularly in connection with early negotiations anticipated between Japan and countries already in the GATT.

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Mr. Singer stated that the Department of State had proposed and secured the standard GATT reservation in previous negotiations on the assumption that the country concerned was actually free to come into the GATT, and that any failure on its part to be in the GATT, being of its own choosing, had no effect on the propriety of this reservation. He pointed out that it was not the desire of the United States to use the GATT reservation in order to impose unequal trade relations, and that the Department of State had indicated that some adjustment might be made in the present case in view of the special circumstances involved. There was as yet no definite idea as to what the appropriate solution might be, but it was believed that it should be in the nature of a clarification or qualification of the third paragraph.

Mr. Adams added that paragraph 3 was essential to the FCN Treaty, but that the American side would be most willing to consider any solution the Japanese would desire to submit. He stated that a bilateral treaty could not, of course, commit the United States to any course of action inconsistent with its obligations under the GATT, and that it appeared therefore that any qualification suggested by the Japanese side should be made with reference to the second sentence of paragraph 3, and not to the first sentence.

Mr. Bassin added that the Department of State wished to reassure the Japanese representatives that their point of view was fully appreciated, and that it was prepared to approach this problem in a sympathetic manner, fully confident that a mutually satisfactory solution can be found.

Mr. Otake replied that further consideration would be given to the matter, and that the Japanese side would be prepared to discuss a proposed clarification or qualification of this paragraph, possibly at the next meeting.

With respect to paragraph 4, Article XXI, Mr. Otake asked for a definition of "limited purposes". He asked whether a treaty trader or an employee of a Japanese company, permitted to enter the United States in connection with the activities of that company, might subsequently enter the employment of another company, for example of a domestic American firm, without violating the provisions of this paragraph. He also inquired whether employment in another Japanese firm, for example a subsidiary or affiliate of the company originally employing this individual, would be permissible.

Mr. Adams replied that a treaty trader or an employee of the type mentioned by Mr. Otake would be permitted entry into the United States as a non-immigrant, subject to specific limitations on his activities. He added that various types of visas of a non-immigrant or temporary character are issued for entry into the United States; these are granted subject to varying conditions, qualifications or restrictions, and are valid for varying periods, ranging from a few months (for tourists) to an indefinite period of stay (for the so-called treaty traders). The latter are issued a visas of indefinite tenure, valid for so long as they continue to promote trade and commerce between the United States and their country. These individuals could change employment while in the United States, provided, of course, the character of their employment remained unchanged and they continued to promote trade and commerce between the United States and their country. This change could be made with the prior knowledge and approval of the appropriate officials of the

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Department of Justice (the Immigration and Naturalization Service of the United States).

In reply to further questions put by Mr. Nagai, Mr. Adams stated that it is only the individual who enters the United States as an immigrant for permanent residence who is not subject to specific limitations or restrictions on his business or professional activities. Mr. Adams added that the Japanese employee previously mentioned by Mr. Otabe would not be permitted to resign from a Japanese firm in order freely to seek employment in the United States. It was possible, however, for this employee to leave one Japanese branch firm to work for an affiliate or subsidiary of that firm, or even for another legitimate Japanese enterprise also engaged in promoting commerce between Japan and the United States, without losing his treaty trader status, provided the prior approval of the Department of Justice were obtained.

ARTICLE XXII

Mr. Otabe asked for a clarification as to the difference between corporation and company, and for a definition of partnerships and other associations as used in paragraph 3, Article XXII.

Mr. Bassin replied that a company is a society or association of persons interested in a common object and uniting themselves for the prosecution of some commercial or industrial undertaking or other legitimate business. The word, he added, is a generic and comprehensive term which may include individuals, partnerships and corporations. Furthermore, the term is not necessarily limited to a trading or commercial body, but may include organizations to promote fraternity among its members and to provide mutual aid and protection. He added that the word is sometimes applicable to a single entrepreneur.

Mr. Bassin stated that a corporation, on the other hand, is an artificial person or legal entity, created under the authority of the law of a state or subdivision thereof. It consists of an association of numerous individuals as a group under a special denomination which is regarded in law as having a personality and existence distinct from that of its several members. A corporation is vested with the capacity of continuous succession, either in perpetuity or for a limited term of years, and acts as a unit or single individual in matter related to the common purpose of the association within the scope of the powers and authority conferred upon it by law. The words "company" and "corporation" are commonly used as interchangeable terms. Strictly speaking, however, Mr. Bassin said, a company is an association of persons for business or other purposes and may be incorporated or not.

Mr. Bassin further stated that a partnership is a voluntary contract or association between two or more persons to place the money, effects, labor and/or skill of some or all of them in lawful commerce or business, with the understanding that there shall be a proportionate sharing of the profits and losses among them. An association, Mr. Bassin stated, is the union of a number of persons for some special purpose or business. It is generally an unincorporated society, and may consist of a body of persons united and acting together without a charter but pursuant to the methods and forms used by incorporated bodies for the prosecution of a common enterprise. The word "association" is a generic term and may at different times

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comprehend a voluntary association, such as a partnership, which is dissoluble by the persons who formed it, or a corporation dissoluble only by law.

Mr. Otabe stated that these definitions were satisfactory and could be helpful in properly translating this Article into Japanese. He then asked if the various religious groups and foundations in the United States were considered juridical persons, and whether they were included in paragraph 3.

Mr. Bassin replied that organized religious groups and foundations may be juridical persons, but are usually unincorporated associations.

Mr. Otabe inquired whether a Zaidai Hojin was covered by paragraph 3, and, if so, what would be the nature of national treatment accorded such organizations in the United States. He explained that a Zaidai Hojin is a duly organized juridical person with given property, established for the purpose of employing or disposing of said property for a given public purpose. An example of a Zaidai Hojin, he added, would be an endowed private library.

Mr. Bassin replied such an organization would be considered a juridical person in the United States, pursuant to the provisions of paragraph 3, if it were so considered in Japan.

Mr. Nagai then asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned in paragraph 3 meant anything more than the recognition of the existence of a juridical person.

Mr. Bassin replied that "juridical status" meant "legal status", the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph 3, he added, meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party.

It was then agreed that the next meeting would be held on Friday, April 11, 1952, with discussions to begin on Article XXIII.

PROVISIONS ON COMPANIES IN UNITED STATES COMMERCIAL TREATIES*

BY HERMAN WALKER, JR.**

Office of International Trade and Resources, Department of State

Prior to World War II, U. S. commercial treaties either were silent concerning the applicability of their provisions to corporations and other associations, or provided in only a limited way for such entities. From the start, treaties of this kind concluded by the United States have been concerned with the rights and privileges of persons. It was not until 1911, however, that these treaties began to reflect attention to companies as such—artificial, as distinguished from natural—persons. Only during the last ten years have they dealt with companies systematically and comprehensively to a degree comparable with the treatment provided for natural persons.¹ This development has been characterized as "perhaps the most striking advance" effected by recent treaties over those antedating 1946.²

* Certain other features of U. S. commercial treaties have been discussed in articles by Robert B. Wilson, appearing in this JOURNAL, as follows: "Property-Protection Provisions in U. S. Treaties," Vol. 45, pp. 93-107 (1951); "Access-to-Courts Provisions in U. S. Commercial Treaties," Vol. 47, pp. 20-48 (1953); "Natural-Resources Provisions in U. S. Commercial Treaties," Vol. 48, pp. 855-879 (1954). The term "commercial treaties" is used here in the same sense as in those articles; that is, broad treaties which contain provisions relating to establishment as well as to trade and shipping, and most frequently called treaties of "friendship, commerce and navigation."

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¹ Those signed since World War II are: treaties of friendship, commerce and navigation with China, 1946 (63 Stat. Pt. 2, 1299), Italy, 1945 (63 Stat. Pt. 2, 2255; supplemented by Agreement of Sept. 20, 1951, S. Exec. II, 82d Cong., 2d Sess.), Ireland, 1950 (2 U. S. Treaties 785), Colombia, 1951 (S. Exec. M, 82d Cong., 1st Sess., withdrawn from Senate, June 30, 1953), Greece, 1951 (T.I.A.S. No. 3057), Israel, 1951 (5 U. S. Treaties, Pt. 1, 550), Denmark, 1951 (S. Exec. I, 82d Cong., 2d Sess.), Japan, 1953 (4 U. S. Treaties, Pt. 2, 2063), Federal Republic of Germany, 1954 (S. Exec. E, 84th Cong., 1st Sess.), Haiti, 1955 (S. Exec. H, 84th Cong., 1st Sess.); Nicaragua, signed Jan. 21, 1956 (S. Exec. G, 84th Cong., 2d Sess.); treaty of friendship, commerce and economic development with Uruguay, 1949 (S. Exec. D, 81st Cong., 2d Sess.); treaty of amity and economic relations with Ethiopia, 1951 (4 U. S. Treaties, Pt. 2, 2134); and treaty of amity, economic relations and consular rights with Iran, signed Aug. 15, 1955 (S. Exec. E, 84th Cong., 2d Sess.) These treaties fall into three patterns. Those succeeding the China and Italy treaties reflect an extensive reorganization and condensation of the content of those two instruments. The Ethiopia and Iran treaties represent a further abridgment of this material, and add provisions on diplomatic and consular rights. All are substantially alike, however, with regard to the points discussed in this article, except as otherwise noted and except that the Ethiopia and Iran treaties lack some of the refinements found in the others. The treaty with Japan will usually be used herein for illustrative purposes, because it is the most recent in point of signature to have entered into force.

² Testimony of Deputy Assistant Secretary of State Linder, Hearing before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, Eighty-second Congress,

This country began entering into commercial treaties containing establishment provisions while the Revolutionary War was still being fought. The first treaty of any kind signed on behalf of the United States, in fact, appears to have been the Treaty of Amity and Commerce of February 6, 1778, with France;¹ and throughout its history the United States has concluded many such treaties, to the number of approximately 130 great and small, according to one recent official estimate.² Concurrently with the early growth of the U. S. commercial treaty network, business corporations also were growing in number and economic importance. Such entities, albeit few in number,³ were known even at the time of the Constitutional Convention. By 1800 no less than 300 corporations for profit had been chartered in the United States;⁴ in 1837, Chancellor Kent noted that incorporations had been increasing "to a most astonishing extent";⁵ and by 1839 the Chief Justice felt able to take judicial notice of the widespread involvement of corporations in interstate and foreign transactions.⁶

With the passage of time, of course, corporations became a fact of major magnitude in the American economy. Contemporaneously, corporations were from time to time coming to diplomatic attention, as is indicated by their appearance on occasion on the pages of diplomatic correspondence,⁷ and by internal evidence contained in a number of nineteenth-century agreements. Claims conventions concluded from mid-century onwards frequently made express provision for the claims of corporations as well as for those of individuals;⁸ and from at least as early as 1827, commercial treaties with European countries sometimes contained allusions to

second session, on treaties of friendship, commerce and navigation with Colombia, Israel, Ethiopia, Italy, Denmark, and Greece . . . May 9, 1952, p. 4.

¹ This was signed even before the Franco-American treaty of Alliance of the same date (5 Moore's Digest 586). Other commercial treaties prior to the adoption of the Constitution include those with the Netherlands, 1782; Sweden, 1783; and Prussia, 1785. Texts may be found in Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1776-1909*. Citations will not be given in this article for treaties which may readily be found in Malloy, or in the supplementary collections for 1910-1923 and 1923-1937 compiled by Redmond and Trenwith, respectively.

² Fact Sheet entitled "Commercial Treaty Program of the United States" (Department of State, March, 1952), p. 3. An annex lists those actually in force as of that date.

³ McGovney, "A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts," 56 *Harvard Law Rev.* 853, 897 (1943); Williston, "History of the Law of Business Corporations before 1800," 2 *ibid.* 149, 165-166 (1888).

⁴ Davis, *Essays in the Early History of American Corporations*, Vol. II, pp. 8, 331-334 (Cambridge, 1917).

⁵ *Commentaries on American Law*, Vol. II, p. 414 (14th ed.).

⁶ *Bank of Augusta v. Earle*, 13 Peters 519, 585, 590 (1839).

⁷ For example, *Foreign Relations of the United States, 1866*, Vol. III, p. 552; 1867, Vol. I, pp. 452, 456; 1867, Vol. II, p. 272; 1868, Vol. II, p. 1034; 1871, p. 242; 1875, Vol. I, pp. 275-276, 278.

⁸ For example, the Claims Convention of 1853 with Great Britain, Art. I. The usual form of words in such instances was "all claims on the part of corporations, companies or individuals, citizens of . . . etc."

corporations. Typically, such allusions were of an obverse character, in the sense of identifying special-privilege entities of the grantor party against which the trade and shipping of the grantee party were to be protected (obligations imposed upon, rather than rights to be accorded to, such entities);¹¹ but in at least one instance, company privileges were mentioned as a standard to which a treaty right of citizens and vessels was referable,¹² and in two instances American companies were designated in a specialized way as beneficiaries of a treaty right in the other country.¹³ Nevertheless, until the treaty of 1911 with Japan, the general schematic policy consistently followed in describing the persons entitled to commercial treaty rights was to speak merely of "citizens," "subjects," "inhabitants," or "nationals."

That the treaty-makers of the past should have refrained from providing for corporations in commercial treaties seems explicable. Commercial treaties, although they have always tended to serve broad diplomatic objectives and although they have undergone changes in emphasis with the passage of time, were in their historical form designed primarily to promote trade and to protect the instrumentalities of trade—goods that move in commerce, ships that carry goods, "merchants" who "come with their ships and cargoes." Corporations do not figure in this mobile image.

A corporation, as explained in the oft-cited statement of Chief Justice Taney, is a creature of sovereignty which can exist only within the jurisdiction of the state creating it and cannot move or migrate outside that jurisdiction.¹⁴ This doctrine raised persistent problems for the courts, up into the present century, in developing constitutional protection for corporations in interstate relations,¹⁵ a circumstance which, for American

¹¹ For example, Art. VII of the 1827 Treaty of Commerce and Navigation with Sweden/Norway pledges each signatory "not to grant in its purchases, or in those which might be made by companies or agents acting in its name or under its authority, any preference to importations made in its own vessels . . ." (Art. XV of the same instrument contained also a rule concerning the services of "salvage companies," in connection with shipwrecks). A fairly common provision has been one providing non-discrimination in the matter of shipping charges "levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever" (Art. II of the 1837 treaty with Greece), phraseology which later became spelled out to read "Government, public functionaries, private individuals, corporations or establishments of any kind" (Art. VII, treaty of 1902 with Spain). The evident purpose of such references was to prevent indirect impairment or nullification of treaty rights through actions of entities not the government (e.g., a monopolistic trading company enjoying special powers, such as an East India Company).

¹² Art. VIII, treaty of 1858 with Bolivia.

¹³ Art. IV (17) of the 1881 treaty with Madagascar (coaling rights of American steamship companies); Art. XII of the 1903 treaty with China (navigation on the inland waters of China).

¹⁴ *Bank of Augusta v. Earle*, 13 Peters 519, 588 (1836).

¹⁵ See McGovney, *loc. cit.* 853-898, 1050-1124; *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165, 169 (1939); Willoughby on the Constitution 1291 (2nd ed., 1929); Willis, *Constitutional Law* 849-850 (Bloomington, 1936); note in 14 Col. L. R. 434-436 (1910); note in 48 Mich. L. R. 228-230 (1949). These two law review notes indicate that the Supreme Court's development of the main theoretical bases for constitutional protection to corporations was not complete until 1910.

negotiators at least, would have extended into the international sphere.¹⁴ As a practical matter, it was not until about the last quarter of the nineteenth century that "men's minds had become habituated to corporate activities which crossed state lines";¹⁵ and it was not until well into that quarter-century that authority for the creation of mercantile corporations, the particular type most readily associated with the traditional avowed purposes of a commercial treaty, came to be granted by many of the states.¹⁶ The seeking of redress in a claims convention for unlawful damages to the acquired property of corporations would thus appear to have been conceptually possible considerably before the active projection of corporations across jurisdictional boundaries in the framework of a commercial treaty.

It has been remarked, furthermore, that a real practical need for seeking treaty protection for corporations began to appear only around the turn of the century.¹⁷ But that period was one in which the United States Government was showing slight interest in concluding general commercial treaties, and hence having little occasion to make decisions about the subject. Very few indeed were entered into between the Serbian treaty of

¹⁴ Also of possible pertinence to the conceptual feasibility of treaty-making about corporations was the doctrinal debate between the "fictional" and "natural" schools which, according to Latty, was still so unresolved at the beginning of the 20th century that at that time "it could not be said . . . that there was any well defined principle of international law" as to the juridical position of foreign corporations. "International Standing in Court of Foreign Corporations," 29 Mich. L. R. 28, 33 (1930). Indeed, historically the "attribution of personality to business corporations was a matter of slow evolution" (Baty, "The Rights of Ideals—and of Corporations," 33 Harv. L. R. 358, 360 (1920)), an evolution accompanied by much debate. For example, Prof. Hohfeld argued vigorously in an article published in 1909 that the "only conduct of which the state can take notice by its laws must spring from natural persons—it cannot be derived from any abstraction called the 'corporate entity' . . ." 9 Col. L. R. 285, 289.

¹⁵ Justice Frankfurter in the *Nirbo* case, *supra*, 170. The American cases cited by Beale as settling the proposition, already known at common law, that a corporation may lawfully act (by agent) outside the jurisdiction of its creation, date mostly from the end of the 19th century (*The Law of Foreign Corporations* 154 (Boston, 1904)); and Keasbey remarks that it was only in 1863 that New Jersey, a leader in the latter 19th century in adopting legislation facilitating incorporations, recognized by statute that "any company organized under the general law might carry on part of its business outside of the state." "New Jersey and the Great Corporations," 13 Harv. L. R. 193, 204 (1899).

¹⁶ Justice Brandeis, in the course of his dissenting opinion in *Liggett Co. v. Lee*, states: "Authority to incorporate for mercantile business, where specifically provided, was given relatively late. E.g., Md. Laws 1894, c. 599; Tenn. Acts 1887 c. 139; Vt. Laws 1894, no. 105; compare Ind. Laws 1889, c. 81, No. 1. And see Cook on Corporations (1889), p. 91: 'The general corporation laws [of Penna.] do not provide for mercantile corporations.'" 288 U. S. 517, 541, 555 n. Texas affords another illustration: *Empire Mills v. Alston Grocery Co.*, 15 S. W. 505 (1891).

¹⁷ Jones, "Claims on Behalf of Nationals Who Are Shareholders in Foreign Corporations," 29 Brit. Year Book of Int. Law 225-226 (1949). See also 2 Hackworth's Digest 432. In Wharton's Digest (1887) there appears only negligible material on corporations, whereas in Moore's Digest, published 20 years later, the amount is moderately substantial.

1881 and the Japanese treaty 30 years later.²⁰ There were, it may be noted, two instances during that time when the United States had occasion to experiment with the formulation of international engagements regarding corporate rights through the medium of special-purpose agreements.²¹ Thus there was no sharp break in treaty policy, but a period of gestation, so to speak, during which an assured basis for a re-oriented policy could take shape.

The textual silence of the older treaties with respect to corporate rights does not in and of itself, of course, necessarily answer the question of their applicability to corporations, if other textual references can be construed to cover them by implication. So, in correspondence concerning the diplomatic protection of corporations, it has sometimes been asserted or assumed that the word "citizens," "nationals" or "subjects" in an outstanding treaty includes corporations.²² Nevertheless, though there are analogies in constitutional and statutory construction for such an interpretation—as, indeed, there are analogies for the contrary²³—an historical analysis leads to a presumption that the absence of provisions for corporations in past treaties reflects a lack of intention to include rights for corporations. This presumption is strengthened by other considerations as well. An artificial person cannot in fact enjoy a number of rights commonly granted to "nationals" or the like, in commercial treaties (e.g., liberty of conscience, exemption from compulsory military service). Strictly speaking, indeed, it cannot be a "national" or "citizen," since those terms imply relations of personal allegiance to a sovereign state which only natural persons can have.²⁴ At no time have corporations been subsumed under the expression "nationals," or the like, in the formal structure of

²⁰ During that span, it seems that the only general-purpose commercial treaty of a normal reciprocal type concluded was that with Peru in 1887, aside from the treaty of 1894 with Japan, which ended extraterritoriality for the United States in that country, and the treaty of 1902 with Spain, following the Spanish-American war. "After the Civil War, interest in treaty-making decreased with the dwindling of our merchant marine and the growing national absorption in industrialization and the development of our natural resources." Fact Sheet, cited *supra*, p. 4.

²¹ *Infra*, at notes 26 and 27.

²² Foreign Relations, 1889, pp. 480-483 (Art. I, 1837 treaty with Greece); Foreign Relations, 1891, pp. 3-4 (Art. IX, 1853 treaty with Argentina); Foreign Relations, 1899, pp. 345-347 (taxation under the treaties of 1850 with Switzerland and 1875 with Belgium); Foreign Relations, 1902, pp. 37-42 (1829 treaty with Austria-Hungary); Foreign Relations, 1910, pp. 61-66 (Art. III, 1853 treaty with Argentina); 3 Foreign Relations, 1929, pp. 227-229 (1864 and 1928 treaties with Honduras); and 3 Hackworth's Digest 428 (Art. XXIV, 1858 treaty with China). Further, see 2 Hyde, International Law 1181 (2nd ed.); and compare *Pearl Assurance Co. v. Harrington*, 38 F. Supp. 411, 413 (1941).

²³ For summary of statutory and constitutional construction, see 18 C.J.S. 388-389; 7 Words and Phrases 255-262 (1952), and note 15 *supra*.

²⁴ By way of a comparative note, McGorvey, *Ido. cit.*, emphasizes that the Supreme Court consistently, "over and over again, early and late" (p. 861), has held a corporation not actually to be a "citizen" for constitutional purposes. The jurisdictional privilege developed for corporations under the diversity-of-citizenship clause was based on a presumption concerning the citizenship of the individuals forming the corporation.

United States commercial treaties. Moreover, the inclusion of artificial persons in the broad sweep of a commercial treaty poses certain special problems of a technical as well as a policy nature which require special attention; and when commercial treaties did begin evidencing concern with corporations as a class, the provisions made for their rights were not only set apart from, but were for many years strictly limited as compared with, the provisions made for individuals. The now established official view, accordingly, is that in general corporations are not deemed to be within the purview of a commercial treaty—except as there may be express provision to that effect.²³

II

Although the treaty of 1911 with Japan, like prior treaties, specified only "citizens or subjects" in its establishment provisions, it carried also a provision, new to United States commercial treaties, as follows:

Limited-liability and other companies and associations, commercial, industrial, and financial, already or hereafter to be organized in accordance with the laws of either High Contracting Party and domiciled in the territories of such Party, are authorized, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.

The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof. [Article VII]

The antecedents of this provision in United States practice were, aside from the above-cited claims conventions, special agreements with Greece in 1890²⁴ and with Russia in 1904,²⁵ though earlier examples occur in the

Compare, for example, *Pilgrim Real Estate, Inc. v. Superintendent of Police*, 112 N.E. (2d) 796 (Mass. 1953).

²³ 3 Hackworth's Digest 431-432. This would be so, at least, in the absence of persuasive evidence of a contrary intent in the negotiating record. Compare *Swiss Ins. Co. v. Miller*, 267 U. S. 42, 46 (1925). A similar position apparently has been taken on occasion by the Spanish Government (*ibid.* 430); by British legal officials (Law officers' opinion, 1591, cited in Jones, *loc. cit.*, 223 n.); and by the Supreme Court of Iowa (*Scottish Union and National Insurance Co. v. Herriott*, 80 N.W. 665 (1899)).

²⁴ This was in the form of an exchange of notes explaining that Art. I of the 1837 commercial treaty was construed to extend to business companies, especially in respect of access to courts, provided only such entities "always conform" to the "laws and customs" of the country. This exchange appears to have been considered merely declaratory of municipal law in the United States. *Foreign Relations*, 1889, pp. 482-483.

²⁵ Although this agreement is explicitly limited to status and juridical rights, and although there was at the time in force with Russia a treaty (of 1832) similar to that in force in 1890 with Greece, this document was handled independently and as a treaty requiring Senate approval. Whether this difference in procedure has bearing on the question raised at notes 22-25 *supra*, is not clear. These agreements were in each instance apparently occasioned by the policies of the other country (*Foreign Relations*, 1889, pp. 480-482; *Universal Adjustment Corp. v. Midland Bank*, 184 N.E. 152, 154 (Mass. 1933)), and illustrate the development of provisions on companies in response to practical need.

practice of other countries.²⁸ The precedent established by the treaty with Japan was followed by the treaty of 1920 with Siam, Article V thereof being identical in its first paragraph with the article of the Japan treaty, except for omission of the qualifying phrase "commercial, industrial, and financial." In lieu of the second paragraph of the Japan treaty article, however, there was a paragraph providing most-favored-nation treatment and national treatment for American companies with respect to access to the courts of Siam.

Beginning with the treaty of 1923 with Germany, twelve general commercial treaties were concluded during the inter-war period, all of which contained the following provision on companies:

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

The right of such corporations and associations of either High Contracting Party so recognized by the other to establish themselves within its territories, establish branch offices and fulfill their functions therein shall depend upon, and be governed solely by, the consent of such Party as expressed in its National, State, or Provincial laws.²⁹

This series of treaties expands somewhat the coverage of its predecessors in that notably the benefits of the provision are extended to non-profit entities, an advance apparently over normal international practice.³⁰ On the other hand, additional tests are inserted regarding recognition; *vis.*, in ad-

²⁸ For example, Great Britain had entered such agreements with several countries, beginning in 1862 with France and then Belgium (52 Brit. and For. State Papers 81 and 24); and a provision on companies had appeared in a number of commercial treaties concluded by Belgium, beginning with Portugal in 1874 (65 *ibid.* 323, Art. II).

²⁹ Treaty of Friendship, Commerce and Consular Rights signed Dec. 8, 1923, Art. XII. The others were with: Austria, 1928, Art. IX; El Salvador, 1926, Art. XII; Estonia, 1925, Art. XII; Finland, 1934, Art. XVI; Honduras, 1927, Art. XIII; Hungary, 1925, Art. IX; Latvia, 1928, Art. XIII; Liberia, 1938, Art. XVII; Norway, 1928, Art. XII; Poland, 1931, Art. XI; and Siam (Thailand), 1937, Art. 5. The treaties with Liberia and Siam were called "friendship, commerce and navigation"; the rest had the same title as the treaty with Germany. In addition, two short establishment conventions were concluded, each containing a single substantive article providing most-favored-nation treatment for nationals and corporations, with, respectively, Turkey (1931) and Greece (1936).

³⁰ The Siam treaty of 1920 was not explicit on the point, while the Japan treaty of 1911, as well as the earlier agreements with Greece and Russia, related only to "commercial, industrial, and financial" entities. Treaties made by other countries usually contain this qualifying formula or a variant thereof (*e.g.*, "for profit" or "economic character"). Sometimes provision will be made for "civil" as well as "commercial" entities (*e.g.*, Italy-Albania, 1924, Art. IX, 122 Brit. and For. State Papers 1) and, occasionally, for co-operatives (*e.g.*, Norway-Guatemala, 1938, Art. II, 142 Brit. and For. State Papers 619).

dition to being duly organized under the laws of one of the parties to the treaty, a company, in order to be recognized, must maintain a central office in the state of its creation and, secondly, must pursue no aims in the host state contrary to the laws of the latter. Finally, the far-reaching reservation of the second paragraph of the Japan treaty article is maintained. This reservation makes it clear that companies are not on a par with natural persons for the purpose of enjoying treaty privileges accorded to "nationals" with respect to engaging in activities. A similar reservation has been common in the contemporary treaties of other countries.²¹

III

The policy inaugurated with the China treaty of 1946²² has been to provide fully for the rights of companies to the same degree vouchsafed individuals, and according to like standards, in all clauses factually applicable to both artificial and natural persons. For example: "Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities. . . ."²³ Just as certain other clauses are, owing to their nature, framed for "nationals" only, so the task of providing adequately for companies in an instrument so broad in scope as a modern treaty of friendship, commerce and navigation of the type favored by the United States, encounters distinct problems requiring special attention.

Definition, Nationality and Status of Companies

A "company" is defined simply and broadly to mean any corporation, partnership, company or other association which has been duly formed under the laws of one of the contracting parties; that is, any "artificial" person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit.²⁴ Every association²⁵ meeting

²¹ Of a sampling of 63 relevant treaties found in the British and Foreign State Papers for the years 1923, 1925, 1930, 1937 and 1938, and involving a wide variety of countries other than the U. S., 37 contain a qualification to this effect (sometimes in briefer terms and sometimes with the addition of a most-favored-nation clause). Of the remainder, 23 achieve a comparable result by limiting the rights of companies to most-favored-nation treatment, with or without an accompanying reference to an obligation to conform to the local laws; in one, the company provision is unilateral; and in another the provision on companies is confined expressly to the matter of juridical status. One instrument is of uncertain classification: a treaty of 1925 between Hungary and Poland (123 Brit. and For. State Papers 861, Art. 3). Earlier examples of an explicit reservation like that in the U. S. treaties in reference may be found in a number of treaties or agreements dating from the two decades preceding World War I, to which Japan, Russia, Germany, or Austria-Hungary, respectively, were signatory.

²² Citations to this and subsequent treaties are in note 1 *supra*, and will not be repeated.

²³ Art. VII, par. 1, Japan treaty of 1953.

²⁴ The standard definition is exemplified by Art. XXII, par. 3, of the 1953 Japan treaty. The question of government corporations is not dealt with in the present paper.

²⁵ A "company" for treaty purposes includes common-law partnerships and other unincorporated associations which are not regarded as distinct legal persons. This ab-

this simple test of valid existence must be accounted by the other party a company of the party of its creation, and have its juridical status recognized without any reservation for the laws of the forum. In comparison, as above noted, the twelve United States treaties of the 1923-38 series contained two additional requirements. Projected multilateral conventions²² and treaties of other countries (especially of the twentieth century) dealing with companies,²³ have very frequently contained a requirement of the same general type as the "central office" requirement—usually in terms of "seat" ("*siège sociale*"), sometimes "domicile," occasionally "registered"—without necessarily leaving clear in all cases whether is meant merely the legal headquarters, or the real center of management, or the center of exploitation;²⁴ and a "control" test has sometimes been favored.²⁵

sense of differentiation between those which are, and those which are not, endowed with legal personality is stated to have been the general commercial treaty practice also of other countries (22 A.J.I.L. Spec. Supp. 160 (1928) as cited *infra*). U. S. Treaties follow the usual conflict-of-laws rule to the effect that the law of the place of creation determines whether a given association, whatever its name, enjoys the attribute of legal personality. *Ibid.* 189; *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566; *Puerto Rico v. Russell and Co.*, 288 U. S. 476 (1933); 2 Benie, *Conflict of Laws* 736-738, 766-767 (1935); Wolff, *Private International Law* 302 (1950).

²² For example, the recommendations of the League of Nations Committee of Experts for the Progressive Codification of International Law on conventions concerning, respectively, "Recognition of the Legal Personality of Foreign Commercial Corporations" and "Nationality of Commercial Corporations and their Diplomatic Protection" (Art. 1 of Draft Convention in each case), 22 A.J.I.L. Spec. Supp. 202 and 166 (1928); "Declaration on the Juridical Personality of Foreign Companies," opened for signature at the Pan American Union on June 25, 1936 (ratification of the U. S. deposited, Treaty Series No. 973). Art. 19 of the project on Private International Law prepared by the International Commission of Jurists (Rio de Janeiro, 1927) for submission to the 6th Conference of American States proposed that nationality be determined by "where the general meeting of shareholders is normally held" or, alternatively, by the location of its principal governing board (22 A.J.I.L. Spec. Supp. 273, 275 (1928)).

²³ This was true, for example, of four-fifths of the sample mentioned in note 31 *supra*. A notable group exception is afforded by a number of the treaties concluded between Siam and European countries in 1937-38.

²⁴ The normal continental rule apparently is that the determining factor is "*siège sociale*," in the sense of real center of administration or management. Wolff, *Private International Law* 297, 301 (Oxford, 1950). Further on "*siège sociale*," and the possibility of determining nationality by criteria other than center of management, see *ibid.* 297-299; and Ripert, *Traité Élémentaire de Droit Commercial* 250-251, 370-371 (Paris, 1951).

²⁵ *E.g.*, Kronstein, "The Nationality of International Enterprise," 52 Col. L. R. 983, 1001-1002 (1952); Ripert, *op. cit.* 371. The control test has been applied, for example, by the Franco-German Mixed Arbitral Tribunal, under the terms of the Treaty of Versailles (Lauterpacht, *Annual Digest*, 1919-22, p. 227, 1923-24, p. 259, 1925-26, p. 283). See also, for example, sec. 301(2) of the International Claims Settlement Act of 1949, as amended (P.L. 285, 84th Cong., 1st Sess., approved Aug. 9, 1955); and the Trading with the Enemy Act, as construed in the 1947 and 1952 *Uebersee* cases, 332 U. S. 480 and 343 U. S. 205. It has been suggested that "in general there has been in the post-war period a tendency to regard the control test as a transient measure conditioned and justified by reasons of national safety" (2 Oppenheim's *International Law* (7th ed., Lauterpacht) 276 n.). This subject has recently been reviewed by Domka,

The question of what should constitute a proper test has been much debated.⁴⁰

The simple "classical" test, which has been found acceptable by all countries with which the United States has signed commercial treaties since the late war, nevertheless follows a number of earlier treaties, especially examples dating from the last century,⁴¹ and is consonant also with other precedents.⁴² Further, it represents the practice followed by United States courts in determining the "citizenship" of corporations for jurisdictional and constitutional purposes.⁴³ Moreover, it fits consistently into the general scheme of the current treaty type in that it adapts to companies a nationality test analogous to that applied with reference to the other major objects dealt with in the treaties: goods, ships and individuals. A vessel, by definition, is deemed to have the nationality of the country whose flag it lawfully flies, without reference to such questions as who owns it or where it was built;⁴⁴ goods receive treaty benefits by virtue of having been grown, produced or manufactured within the territories of a party, without reference to who produced them or the routes of their transport in international trade;⁴⁵ and an individual is a national of a party which claims him under its laws.⁴⁶

⁴⁰ "Piercing the Corporate Veil" in the Law of Economic Warfare," *Wisconsin Law Review* (Jan. 1955), pp. 77-90. A "control" test is not necessary for such purpose in the treaty, however, as the treaties of the current series all contain an "essential security" reservation (e.g., Art. XXI, par. 1(d), Japan treaty).

⁴¹ One writer has concluded that, as to a recognized test of nationality, "in the corporate field, we find confusion and uncertainty" (Timberg, "Corporate Fictions," 46 *Col. L. R.* 533, 572 (1946)).

⁴² E.g., the above-cited agreement of 1890 with Greece. A number of illustrations are afforded by treaties or agreements of that period entered into by Great Britain, Belgium, or Germany, respectively. An unusual compromise is found in an exchange of notes to the Italo-Rumanian treaty of 1930, providing that the rights accorded companies, in principle limited to those "domiciled" in the country of charter, will in certain instances be extended to those which "even" have their seat outside the country to which they "belong" (133 *Brit. and For. State Papers* 685, 712).

⁴³ Crandall, "Principles of International Law Applied by the Spanish Treaty Claims Commission," 4 *A.J.I.L.* 806, 814-815 (1910); Feller, "The German-Mexican Claims Commission," 27 *ibid.* 62, 68 (1933); Woolsey, "Litigation of the Sabotage Claims Against Germany," 35 *ibid.* 282, 299-301 (1941); 6 *Moore's Digest* 641; Borchard, *Diplomatic Protection of American Citizens Abroad* 623; 2 *Hackworth's Digest* 567, 3 *ibid.* 420, 423. However, the government will not necessarily choose actually to espouse a specific claim in which a corporation lacks a substantial national interest in its ownership (see, for example, 1 *Whiteman, Damages in International Law* 129; 2 *Hackworth's Digest* 500, 5 *ibid.* 845; and Art. 2(B) of Agreement on Settlement of Pecuniary Claims Against Yugoslavia, signed July 19, 1943, T.I.A.S. No. 1803).

⁴⁴ Drachler, "The Status of Alien Corporations in the Law of the United States," 23 *Fordham Law Review* 49, 59 (1954); *Steamship Co. v. Tugman*, 106 U. S. 118 (1882); *Thomas v. Trustees*, 195 U. S. 207 (1904); 20 *C.J.S.* 10.

⁴⁵ The standard rule recites: "Vessels under the flag of either Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that Party. . . ." (Art. XIX, par. 2, Japan treaty of 1953).

⁴⁶ See, for example, Art. XXIV, par. 7, of the 1951 treaty with Greece in conjunction with Arts. XVII, par. 2, and XXI, par. 5, of the same.

⁴⁷ This normal principle is not usually spelled out in the commercial treaties. Two instances, in which it is, are afforded by the 1954 treaty with the Federal Republic of

The adoption of the simple test has been undoubtedly facilitated by the clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits.⁴⁷ Thus the acknowledgment of a fact—the existence and legitimate paternity of an association—is not confused with problems associated with the functional rights and activities of alien-bred associations—whether or not they be for pecuniary profit.⁴⁸

*Access to Courts*⁴⁹

One of the normal consequences of recognition, an attribute of "civil" capacity, is the capacity to appear in the courts of justice, whether as plaintiff or as defendant.⁵⁰ While it is generally presumed, and under liberal rules of construction presumably would be held, that the recognized possession of the capacity to appear carries with it the right of appearing, enjoyment of a capacity does not as such necessarily mean that the exercise of the right will be permitted.⁵¹ In any event, the recognition of the capacity does not determine the terms and conditions under which the right to sue and be sued may be exercised.

In the 1911 treaty with Japan and the 1920 treaty with Siam the right is framed as follows, in terms very similar to those normally employed in treaties of other countries: "appear in the courts either as plaintiffs or

Germany (Art. XXV, par. 6; Protocol, par. 22) and the 1951 treaty with Israel (accompanying exchange of notes).

⁴⁷ Nationality and juridical status do not exhaust the roster of attributes of "civil capacity," as given in the usual definition. However, insofar as the exercise of rights associated with other civil attributes (e.g., capacity to own property) is concerned, this is dealt with specifically in the treaty, as is the exercise of rights associated with functional capacity.

⁴⁸ In foreign treaty practice, in contrast, there has been evident a tendency to deal with business corporations to the exclusion of non-profit societies. See note 30 *supra*. The League of Nations projects, cited *supra*, were for their part confined to "commercial" corporations. For material bearing on this point, see Latty, *loc. cit.* 33-37, and Wolff, *op. cit.* 301.

⁴⁹ See Wilson, article in 47 A.J.I.L. (1954), cited *supra*.

⁵⁰ The inclusion of entities lacking legal personality in the concept of "companies" for treaty purposes (*supra*, note 35) is warranted on the ground that it is not always necessary for an association to have a distinct and independent personality for it to be recognized and regarded as an entity "capable of exercising certain rights and subject to certain obligations of a collective nature" (e.g., to sue or be sued). 22 A.J.I.L. Spec. Supp. 159 (1928) (as cited *supra*, note 36); also Bryant Smith, "Legal Personality," 37 Yale L. J. 283, 299 (1928). Since the treaty rule is "national treatment," the question is left open as to whether, and under what circumstances and conditions, an unincorporated entity might be allowed to appear as party to litigation or exercise other rights. On this subject see notes in 37 Mich. L. R. 141 (1938); 38 Col. L. R. 454 (1938); 33 Calif. L. R. 444 (1945); Dodd, "Dogma and Practice in the Law of Associations," 42 Harv. L. R. 977 (1929); Sturges, "Unincorporated Associations as Parties to Actions," 33 Yale L. J. 383 (1924); and cases applying Rule 17(b) of the Federal Rules of Civil Procedure.

⁵¹ Recognition of legal status does not necessarily carry with it the right to access to courts. See 20 C.J.S. 65-67; Rabel, *The Conflict of Laws* (1947, Michigan Legal Studies), II, pp. 203-206.

defendants, subject to the laws of such other Party." The 1923-38 series merely elaborated somewhat the same thought. The more recent treaties introduced revisions which may be summarized in four parts as follows:

First, the basic standard established is that of national treatment: i.e., the companies of one party will be allowed access to the courts of the other party on terms no less favorable than those applicable to the companies of such other party.⁵² As corollary to prohibiting discrimination as between the alien and the domestic company, there is no proviso to the effect that the exercise of this right may be qualified by local laws.⁵³

Secondly, most of the later treaties carry a protocol provision explaining, as a corollary of the major principle, that the non-discrimination rule shall extend to requirements regarding security for costs.⁵⁴ This provision follows prevailing United States practice to the effect that requirements for security should be based on objective tests, such as residence or ownership of property within the jurisdiction, rather than on the subjective test of nationality.⁵⁵ It precludes the imposition of discriminatory requirements which might burden the pursuit of judicial remedies and which otherwise, in the absence of a clear recorded understanding, might possibly be thought permissible under the treaty.⁵⁶

Thirdly, in recognition of the widespread present-day existence of commissions and agencies outside the regular judiciary to adjudicate, or to make determinations affecting, important interests and privileges, the usual provision for access "to the courts of justice, in all degrees of jurisdiction" is expanded in the new treaties so as to include in the same way "administrative tribunals and agencies."

Fourthly, relief from domestication and registration requirements has been provided for the company which has not been admitted to do business, and in fact is not engaged in activities within the jurisdiction, but which has occasion nevertheless to resort there to litigation (as to sue for breach of contract or infringement of trademark). The antecedent of this pro-

⁵² This standard is usually supplemented by a most-favored-nation treatment clause. A representative provision is that in the 1953 treaty with Japan (Art. IV, par. 1).

⁵³ The phrase "in conformity with the applicable laws and regulations" occurs, however, in the wording of the treaties with China and Italy. This phrase is framed in such manner as to imply that it does not constitute a reservation detracting from the treaty right; and such phraseology has been omitted from subsequent treaties.

⁵⁴ E.g., Protocol, par. 1, of the Japan treaty: "The term 'access to the courts of justice and to administrative tribunals and agencies' as used in Article IV, paragraph 1, comprehends, among other things, legal aid and security for costs and judgment." For variant formulas see treaties with Ireland (Protocol, par. 4), Ethiopia (Art. VII, par. 2), Germany (Protocol, par. 6).

⁵⁵ 20 C. J. S. 368-373; 3 Hackworth's Digest 569.

⁵⁶ The only U. S. treaty in the inter-war period which mentions the subject is that with Estonia, which states in a Protocol that the access-to-courts provision does not embrace deposit of security requirements. There are continental cases reported in Lauterpacht's Annual Digest of Public International Law Cases holding that a general access-to-courts provision, without more, does not establish a rule with respect to such requirements (op. cit., 1919-22, p. 243; 1929-30, p. 263; 1931-32, p. 276; 1933-34, p. 307). Similarly see Nussbaum, "American-Swiss Private International Law," 47 Col. L. R. 186, 189-190 (1947).

vision is an understanding attached by the United States to its adherence to the 1936 Inter-American Declaration on the Juridical Personality of Foreign Companies (cited above, note 36), for the reason that without this understanding the Declaration "would be of little value" to United States corporations in countries where it had been the practice "to require companies which have no permanent establishment, branch or agency in the country to register or domesticate themselves before they may become party to a suit, which registration or domestication would require payment of large fees, or subjection to taxation."⁸⁷

Functional Rights of Companies

From the viewpoint of economic foreign policy, a major current incentive for seeking modern treaties is the desire to establish agreed legal conditions favorable to private investment.⁸⁸ Inasmuch as investment nowadays occurs predominantly through the corporate medium, provisions for the rights merely of individuals would fail to a serious extent to meet real investor needs. Traditionally, the standard of "national treatment" for the activities of natural persons has been written into United States commercial treaties so that such persons are enabled freely to go about their affairs without discriminatory burdens or harassments. A salient characteristic of the treaties of the past ten years, therefore, has been the explicit extension to company activity of the same long-established principle. These treaties (with such exceptions and qualifications as will be mentioned below) thus assure to companies of either party equality of treatment with companies of the other party, with respect to engaging in all ordinary business activities, commercial, industrial and financial. This principle applies to both the initial establishment of an enterprise (the entry into the activity) and to the terms and conditions under which the company is entitled subsequently to conduct its enterprise (carry on the activity). To the extent that national treatment is not agreed upon, and in any event, the company will enjoy most-favored-nation treatment.⁸⁹

This principle is set forth in general terms, so as to comprehend the whole range of factors affecting the competitive position of the foreign

⁸⁷ Report of the Secretary of State on the Declaration, Sen. Exec. E., 77th Cong., 1st Sess. (1941), p. 3. A series of articles concerning "the judicial status of non-registered foreign corporations" in particular countries has run in the *Tulane L. R.*, as follows: Vol. 6, p. 558 (Argentina, Chile, Uruguay); Vol. 7, p. 210 (Brazil), p. 341 (Mexico); Vol. 8, p. 542 (Colombia); Vol. 9, p. 409 (Ecuador); Vol. 10, p. 58 (Nicaragua); Vol. 12, p. 74 (Guatemala); Vol. 15, p. 521 (Panama); Vol. 17, p. 575 (Venezuela).

⁸⁸ For illustrative examples of this viewpoint, which has been repeatedly asserted in recent years, both officially and unofficially, see testimony cited at note 2 *supra*; Final Declaration of the 37th National Foreign Trade Convention (N. Y., 1950, Nat. For. Trade Council, Inc.) 16-17; and 68 Stat. 347.

⁸⁹ Art. VII (in four paragraphs) of the Japan treaty exemplifies the approach taken to providing for the business activities of companies. The same approach is in principle extended to non-profit activities (Art. VIII, par. 3). The 1946 treaty with China, however, which marked the transition in U. S. treaty policy toward companies, was somewhat more reserved in its approach; it mentioned national treatment as a principle to be generally aimed for, but subject to a reservation for such municipal legislation as might deviate from that principle (Art. III, par. 3).

company in relation to the domestic company. But separate provisions deal with the special subjects of taxation, of employment of personnel and of real property. In the tax article, the basic principle remains national treatment and most-favored-nation treatment; but in the course of elaborating this principle in this highly technical field, adjustments are made concerning the apportionment of world income for tax purposes⁶⁰ and for double-tax conventions and other reciprocity arrangements.⁶¹ In the matter of employment, provisions have been developed technically going beyond national treatment, to prevent the imposition of ultra-nationalistic policies with respect to essential executive and technical personnel.⁶² As to tenure of real property, assured national treatment is limited to leaseholds of property needed for the conduct of treaty-recognized activities, thus substantially reconciling the treaty commitment with the alien disabilities existing in the laws of certain States of the Union.⁶³

In the matter of protection of acquired property, on the other hand, national and most-favored-nation treatment, though included as supporting standards, do not represent the major standard of treatment stipulated. The major standard, rather, is non-contingent, as in international law.⁶⁴ It is provided that there be "most constant protection and security" and freedom from unreasonable searches and seizures; that there be no arbitrary or unreasonable impairment of a lawfully acquired interest; and, above all, that prompt, just and effective compensation be given in event of expropriation, regardless of the extent to which nationals and companies of the expropriating party may be denied such compensation.⁶⁵

Utilization of the Domestic Company Device

The Supreme Court held in *Jordan v. Tashiro*⁶⁶ that under the 1911 treaty with Japan, subjects of that country were entitled, as a necessary

⁶⁰ E.g., Japan treaty, Art. XI, par. 4. The foreign company is made taxable only as to income attributable to business done in the host country, a provision more advantageous than merely national treatment (under which tax liability might lie for the company's entire or "world" income).

⁶¹ E.g., Japan treaty, Art. XI, par. 5.

⁶² E.g., Japan treaty, Art. VIII, par. 1. This allows, first, free choice in selection of "accountants and other technical experts, executive personnel, attorneys, agents and other specialists" generally; and, second, freedom from professional licensing requirements in the particular case of "accountants and other technical experts" needed for internal auditing and survey purposes. A provision of this type first appeared in the Uruguay treaty (1949), and is not found in several of the treaties.

⁶³ E.g., Japan treaty, Art. IX, par. 1. For recent summaries of the real property laws of the several States, as concerns alienage disabilities, see: McGovney in 35 Calif. L. R. 21-24. (1947); Boyd in 51 Mich. L. R. 1005 n. (1953); and Wilson, in 48 A.J.I.L. 363-365 (1954).

⁶⁴ For fuller discussion, see Wilson in 45 A.J.I.L. (1951), cited *supra*.

⁶⁵ A representative formulation of basic property-protection arrangements is Art. VI of the Japan treaty, together with Art. V, par. 1, thereof. The last-named (generally precluding "unreasonable or discriminatory measures that would impair legally acquired rights or interests") first appeared in the Uruguay treaty of 1949.

⁶⁶ 278 U. S. 123 (1928).

and proper incidental to the rights accorded by the treaty, to form and use the instrumentality of a domestic company, even though the treaty did not refer to this possibility. The right to organize and operate domestic companies, which was thus found to be implied in that treaty, was made the subject of a specific provision in eleven of the treaties of the 1923-38 series. This series of treaties, in reflecting a pioneering move in this subject, adopted the cautious principle of most-favored-nation treatment as to the right of nationals of one party to organize and participate in companies chartered under the laws of the other party. As to the functional rights of these domestic companies, as such, the treaties avoided both national and most-favored-nation treatment, but maintained the non-committal position that local legislation exclusively should govern.⁶⁷

The treaties of the current period have revised this approach in three respects.⁶⁸ First, the right to constitute a domestic company is expanded to include, in addition to the rights given "nationals" in the premises, the right of the alien company to establish a domestic subsidiary or, if it wishes, to acquire a subsidiary by buying up controlling interests in an existing domestic company. Secondly, the standard applicable to the right to organize domestic companies is in principle national treatment. However, owing to the frequent existence of legislation technically at variance with this principle in respect of such materially inconsequential matters as citizenship requirements for the signers of articles of incorporation or for certain members of the board of directors, the treaties in their latest version provide a limited qualification as follows:

The provisions of paragraph 1 of the present Article shall not prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises within its territories; but such formalities may not impair the substance of the rights set forth in said paragraph.⁶⁹

⁶⁷ Art. XIII of the 1923 treaty with Germany. In other treaties of the period the like article appeared as that next following those cited in note 29 *supra*, except the treaty with Siam from which the provision was omitted.

⁶⁸ The provision of the treaty with Japan, cited at note 33 *supra*, continues as follows: "Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party."

⁶⁹ Art. VII, par. 3, of the Japan treaty. Most of the preceding treaties (those with China, Italy, Ireland, Colombia, Denmark, Greece, Uruguay) dealt with this matter in a different way: namely, the right to organize domestic companies is framed in non-contingent terms (i.e., without a national treatment standard), with the result that so long as effective procedures are available there need not be identity of treatment as between the alien and the local party (e.g., Art. VI, par. 2, treaty with Ireland); the most-favored-nation standard also is applicable.

Thirdly, the "controlled" domestic company is itself assured national treatment; discrimination against it in any way by reason of its domination by alien interests is not permissible.

Piercing the Corporate Veil

The marked hesitancy toward undertaking extensive treaty commitments in favor of alien corporations which has been manifest during the past half-century on the part of treaty-making countries, may have been in part attributable to a fear lest such commitments could become a cloak under cover of which rights would be gained by interests of third countries—in a situation in which the party to the treaty would not wish to be obligated to accord them, whether because such third countries were not party to the reciprocal arrangements embodied in the treaty or for other reasons. The recent treaties signed by the United States, at any rate, indicate that this possibility of a "free ride" by third-country interests is one to be guarded against; and it may be supposed that the reservation contained in those treaties for "piercing the corporate veil" has facilitated the post-1945 advance in the bilateral assumption of undertakings regarding corporations. That is, each party reserves the right to apply measures

denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.¹⁰

It will be observed that this reservation does not specify an automatic condition precedent to the enjoyment of treaty rights by companies; rather, it is a latent protective clause which a party may utilize if it wishes to take the initiative of so doing.¹¹ Further, this reservation is directed primarily at the exercise by a company of its "functional" rather than its "civil" capacity. It cannot be invoked in a manner to deny recognition of nationality and legal existence, or of access to courts, regardless of the dominant real interests in the company.

The later treaties also provide for two circumstances in which a party is, on the other hand, obliged to "pierce the corporate veil." These both relate to protection of acquired property, and endeavor to assure that the investments of the ultimate party in interest, lying behind the corporate façade, are safeguarded. The principal of these is a provision, usually in the protocol, clarifying the applicability of the rule requiring prompt, just and effective compensation in event of expropriation:

¹⁰ E.g., Japan treaty, Art. XXI, par. 1(c). The "except" clause is not in the reservation found in the Italy and China treaties.

¹¹ The "explanatory note" to sec. 41.71 (b)(3) of the CFR, regarding criteria used in determining the nationality of a company for purposes of eligibility of its representatives for "treaty trader" visas, suggests one type of situation in which the United States might resort to the reservation (33 Dept. of State Bulletin 477 (1955)).

The provisions of . . . for the payment of compensation shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party.⁷²

That is, a party must "pierce the veil" for purposes of assuring, but may not do so for purposes of denying, compensation to nationals of the other party on account of the interests they hold in any company whose property is expropriated, regardless of the nationality of the company, and however fractional or intermediately held such interests may be.⁷³ The second similar feature is one providing that any "enterprise" in which nationals or companies of one party have a "substantial interest" must be accorded, in the other, "not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control."⁷⁴ This would cover, for example, the selection of enterprises for nationalization under a nationalization program, and protect entities which are neither chartered by the espousing state nor controlled by its nationals.

⁷² Japan treaty Protocol, par. 2. A provision of this sort first appeared in the 1943 treaty with Italy.

⁷³ A similar approach was adopted in the peace settlements following the two World Wars (e.g., Art. 297(c) of the Treaty of Versailles; Art. 78(4) of the Treaty of Peace of 1947 with Italy, 61 Stat. 1245); and Art. 2(c) of the U. S.-Yugoslav Agreement on Pecuniary Claims Against Yugoslavia of July 19, 1948, T.I.A.S. No. 1803. Cf. the formulae adopted in Art. I of the U. S.-Mexican Claims Convention of 1923, wherein a "substantial" interest was stipulated; in the German-Mexican Claims Convention of 1923 and the Anglo-Mexican Claims Convention of 1928, allowing claims only if the German or British stockholder interest exceeded 50% (Feller, "The German-Mexican Claims Commission," 27 A.J.I.L. 62, 66-68 (1933), and 1 Whiteman 132); and in the International Claims Settlement Act of 1949, as amended, requiring American ownership of at least a 25% beneficial interest in the foreign company (sec. 311 (b), P.L. 285, approved Aug. 9, 1955). It should be noted that the latter law has to do with the distribution of a lump-sum settlement already obtained from the foreign government; and the "primary purpose" of a cut-off figure this high was stated to be administrative convenience (Cong. Rec., July 25, 1955, p. 9794). For a variant formula see paragraph 10 of agreement of Jan. 24, 1948, between the U. K. and Poland, 2 Int. L. Q. 544, 547.

Jones, "Claims on Behalf of Nationals Who Are Shareholders in Foreign Corporations," 26 Brit. Year Book of Int. Law 225 (1949), concludes that the "probable state of international law" (p. 251) is that intervention, unless provided by treaty, is "confined to exceptional cases" (pp. 256-257). Further, see 2 Hyde, op. cit. 804-808; comment on Art. 16(b), Harvard draft convention, "Responsibility of States for Injuries to Aliens," 23 A.J.I.L. Spec. Supp. 201 (1929); Maurer, "Protection of Non-Enemy Interests in Enemy External Assets," 16 Law and Contemporary Problems 407, 422-432 (1951); Berger, "Disregarding the Corporate Entity for Stockholders' Benefit," 55 Col. L. R. 808-829 (1955); and Baade, Diplomatic and Treaty Protection of Nationals Who Are Shareholders in Legal Entities Organized or Created under the Law of a Foreign State (I.L.M. Thesis, Duke U., 1955).

⁷⁴ Art. VI, par. 4, of the Japan treaty. Such a provision first appeared in the 1943 treaty with Italy (Art. V, par. 3). A third notable respect in which the treaties afford protection to the parties-in-interest lying behind the corporate façade is that treated *supra*, at note 68, regarding the activities of alien-controlled domestic companies. Compare the axiomatic generalization "*ex hypothesi*, no state can intervene on behalf of a corporation against its own government" (Jones, *loc. cit.* 257).

*Reconciliation of Basic Principles to Special Requirements of the
Contracting Parties*

The major policy impediment historically standing in the way of United States treaty engagements regarding the establishment and activities of alien corporations is the reserved rights of the States under the Constitution to bar or condition the admission of foreign (out-of-State) corporations, insofar as intra-State operations are concerned.¹⁸ The formula which has been devised to provide in principle for realizing the major modern treaty objective of securing national treatment for alien companies, without infringing on the prerogatives of the States, has been as follows:

National treatment accorded under the provisions of the present Treaty to companies of . . . shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America.¹⁹

All out-of-State companies, whether companies of a foreign country or of a sister State, being alike "foreign," each State is left free to exercise its prerogative so long as it does not single out the alien "foreign" company for discrimination as compared with the United States "foreign" company.

Notwithstanding its superficially unilateral character, this formula is not considered to result in fact in any significant inequality of treatment as between the treaty parties because: (1) the business and economy of the United States are today national, and corporations operate freely across State lines;²⁰ (b) the Federal courts have developed a large measure of legal protection for the "foreign" company, under the interstate commerce, due-process-of-law, and equal-protection-of-the-laws clauses of the Constitution;²¹ (c) the formula places the alien company on a plane of equality

¹⁸ *Paul v. Virginia*, 8 Wall. 168 (1865); Hearing before the Committee on Foreign Relations, U. S. Senate, 66th Cong., 1st Sess., on Treaty of Commerce and Consular Rights with Germany, January 25, 1924, p. 21.

¹⁹ E.g., treaty with Japan, Art. XXII, par. 4. The appropriateness of some such adjustment in respect of a country having a federal system has been recognized before. (See "federal clauses" applicable to "ressortissants" found in Art. I of Swiss treaties of establishment with: Belgium, 1887, 78 Brit. and For. State Papers 944, and Germany, 1876 and 1890, 67 Brit. and For. State Papers 534, and 82 *ibid.* 766).

²⁰ Although this phenomenon is sufficiently well known to need no documentation, a revealing figure is afforded by the Securities and Exchange Commission's Statistics of American Listed Corporations, Summary Report, Pt. I, pp. 25-26, 150, 154 (issued before the war and not since revised): 53% of all reporting corporations organized in 1936 and 1937 were chartered by the single small State of Delaware, whereas six of the larger States accounted for the head offices of 7% of all tabulated corporations, wherever chartered.

²¹ The one important field, unreserved by the treaties, in which apparently there exists in a number of the States a substantial degree of discrimination against the foreign company is that of insurance taxation, insurance being treated in effect as intra-state commerce (*Paul v. Virginia*, 8 Wall. 168, and an Act of Congress, 59 Stat. 33, U.S.C. 1011-13, following the *Southeastern Underwriters* case); but it has been stated that this discrimination has not as a practical matter seriously interfered with the interstate

with the bulk of its competitors and, on the other hand, assures it protection from certain disadvantages that could conceivably result from its being treated as a "domestic" company;⁷⁰ and (d) the alien company is given, by express provision of the treaty, the right to establish and operate under the form of a domestic subsidiary without discrimination, whenever that form might appear to it expedient or advantageous.⁷¹

In addition to this formula, reservations have been introduced to safeguard policies known to exist in some States, or in Federal statutes, and which tend likewise to exist in the legislation of many foreign countries,⁷² with respect to alien disabilities in certain sensitive areas: e.g., ownership of land, deposit banking, radio communications, domestic air transport.⁷³ Apart from ownership of realty, most-favored-nation treatment is, however, assured with respect to these reserved activities; and in the most recent treaties there is a provision to safeguard as a vested interest any quantum of national treatment actually acquired.⁷⁴ This is in recognition of the

business of the industry (Federal, State and Local Government Fiscal Relations, S. Doc. 69, 78th Cong., 1st Sess., p. 260).

⁷⁰ A State may, for example, lawfully tax a "domestic" company on its total income wherever derived, but may tax a "foreign" company only on income fairly attributable to business done within the State. States have on occasion exercised their prerogative thus to tax their own companies on an apparently more burdensome basis; e.g., Arkansas, Alabama, Louisiana, Mississippi, *Tax Systems of the World 196-197* (Chicago, 8th ed., 1940). Similarly as to share taxes (*ibid.*, 26, 113, and *Corry v. Baltimore*, 196 U. S. 466); entrance-franchise taxes (Maxwell, *The Fiscal Impact of Federalism in the United States 274* (1946)); and property taxes (Blitker, "The Taxation of Out-of-State Tangible Property," 56 *Yale L. J.* 640-669).

⁷¹ The organization of domestic corporations in the United States tends to be a relatively simple, inexpensive and expeditious process. Eder, "Some Restrictions Abroad Affecting Corporations," 11 *Law and Contemporary Problems* 713 (1946); Breed, "Recognition of Foreign Corporations," paper read at 3rd Conference of the Inter-American Bar Assn., Mexico City, 1944, pp. 23-24.

⁷² Eder, *loc. cit.* 715.

⁷³ In a number of treaties (those other than Japan listed in note 69 *supra*), the reservation is handled by indirection, except as to tenure of property: that is, the reserved subject-matter is omitted from the recitation of activities for which national treatment is provided. In those with Israel, Japan, Nicaragua, Germany and Haiti, broad coverage is provided for all activities, qualified by a specific reservation (e.g., first sentence of Art. VII, par. 2, Japan treaty, reserving "public utilities enterprises, or enterprises engaged in shipbuilding, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources"). See note 63 *supra*, for the way in which property-tenure rights of the treaty alien in the United States is dealt with; the property-tenure rights secured to Americans in the other country vary from treaty to treaty, the most liberal arrangement being one which assures Americans full national treatment subject to the right of the other party to reduce the treatment granted to the level reciprocally accorded its nationals and companies by particular States of the Union maintaining alienage disabilities, in the case of American nationals domiciled in or of companies chartered by such States (e.g., treaties with Italy, Israel, Uruguay, Colombia).

⁷⁴ Those with Japan, Nicaragua, Germany and Haiti, Art. VII, par. 2, second sentence in each case, reading: "However, new limitations imposed . . . upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities . . . shall not be applied as against enterprises which are engaged in such activities at the time such new limitations are adopted . . ." This is in accord with the principle enunciated in *Hanover Fire Ins. Co. v. Harding*, 272 U. S. 494 (1926).

fact that the reservations embody a least common denominator insofar as the States of the Union are concerned, and that either or both of the parties may often in practice not exercise their rights to prevent the establishment of companies of the other in one or more of the reserved activities.

The process of bilateral negotiation through which a mutually satisfactory and acceptable treaty text eventuates has, of course, resulted in a variety of other adjustments in individual treaties, to take account of the special requirements of the other countries. Space considerations do not permit a detailed listing of these adjustments. Many are of a relatively minor or secondary character. As a type, perhaps the major adjustment found in a number of the treaties has to do with the retention in one way or other of the party's right to apply special controls upon the initial establishment of foreign enterprises: i.e., a qualification of the principle of the "open door" with respect to the entry of investment capital or the initiation of an enterprise, without, however, impairment of the principle of non-discriminatory treatment for authorized or admitted enterprises. The Ethiopia treaty contains no commitment as to initial establishment except the undertaking to provide "reasonable opportunity for the investment of capital, and for the establishment of appropriate commercial, industrial and other enterprises."⁴⁴ The treaty with Ireland contains a reservation for the Irish Control of Manufactures Act;⁴⁵ and the Protocols to the Denmark, Japan and German treaties contain provisions acknowledging a limited right to "screen" on balance-of-payments grounds.⁴⁶ Adjustments of this sort roughly equilibrate the treatment of capital to that normally provided in the treaties for individuals and goods: that is, entry of aliens and of imports is subject to special border restrictions and controls through, in the one case, the reservation for immigration statutes⁴⁷ and, in the other, limitation of customs privileges to merely most-favored-nation treatment,⁴⁸ but coupled with assurances of national treatment to duly admitted persons and goods.⁴⁹

IV

After several decades of evolution, there has now eventuated an evidently practicable method for dealing systematically and comprehensively with the status and rights of companies. The objective has been to extend to corporations and other associations a liberal degree of protection comparable

⁴⁴ Art. VIII, par. 4. The treaty with Iran, which is similar, omits even this imprecise undertaking.

⁴⁵ Art. VI, par. 4, and the Minute of Interpretation applicable thereto.

⁴⁶ Respectively, para. 7, 6 and 16.

⁴⁷ The only assured rights of entry are with respect to so-called "treaty traders" (and, since 1952, "treaty investors"); freedom of action is retained as to others (e.g., Art. I, par. 1, Japan treaty). On this subject, see Wilson, editorial comments in 44 A.J.I.L. 145-149 (1950) and 49 *ibid.* 366-370 (1955).

⁴⁸ E.g., Art. XIV, par. 1, Japan treaty. Thereby each party is free to adopt such protective measures as it chooses, so long only as products of the other party are treated no worse than products of any other foreign country.

⁴⁹ E.g., for goods, Art. XVI, par. 1, Japan treaty.

with that which past treaties have for long made familiar as regards natural persons. The chosen vehicle has been the bilateral commercial treaty, a venerable instrument originally designed in bygone days and other circumstances. The realization of this objective has entailed the solution, in terms mutually satisfactory to the signatories, of a number of special problems which impeded the adequate coverage of artificial entities in the past. The result, in terms of signed texts, exemplifies anew the resiliency of the traditional commercial treaty and its adaptability to changed conditions and different needs.⁹⁰

Quantitatively, the group of treaties concluded to date between the United States and like-minded countries since World War II measure perhaps but a modest accomplishment; qualitatively, moreover, shortcomings in the degree of completeness with which they meet all conceivable company requirements are doubtlessly detectable. Nevertheless, they mark a definite advance in an area in which progress through multilateral agreement has so far been lacking. There are sufficient realized examples, considering the variety and the geographical spread of the countries party to them, to form a fairly clear and forward-looking pattern. The growth of this pattern, if and as it occurs with the accretion in time of additional examples, should be conducive to the development of principles of international law, with respect to the treatment of companies. This consummation would seem especially appropriate in an age when international trade and business are so predominantly conducted through the corporate medium.

⁹⁰ On the historical uses and adaptability of this type of treaty, see Sotser, "Treaties to Aid American Business Abroad," 40 Foreign Commerce Weekly 3 et seq. (U. S. Dept. of Commerce, Sept. 11, 1950); Fact Sheet, cited *supra*.